IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 23rd January, 1996.

CRIMINAL APPEAL NO. 893 OF 1987

For Approval and Signature:

THE HON'BLE MR. JUSTICE R.R. JAIN

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the fair copy of Judgment ?

4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

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Shri P.J. Yagnik, Advocate for the appellant (appointed)
Shri K.P. Raval, Addl. Public Prosecutor for the respondent.

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Coram: R.R. Jain, J. & H.R. Shelat,J.
(23-1-1996)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

Being aggrieved by the judgment and order dated 16th September 1987 passed by the then learned Additional Sessions Judge, Sabarkantha at Himatnagar, in Sessions Case No. 26 of 1987 on his file, convicting the appellant of the offence under Section 302 and Section 201 of the Indian Penal Code (for short 'IPC'), and sentencing him to rigorous life imprisonment for the

offence under Section 302, and passing no separate sentence with regard to offence punishable under Section 201, IPC, the appellant (original accused) has preferred the appeal before us.

2. The facts which led the appellant to prefer the appeal may in brief be stated. Nana Dala, the deceased and the appellant were friends. They had attended a bhajan programme relating to the ritual ceremony ordinarily performed for driving out the evil spirit if any. Out of the 12 who were present at the ceremony the deceased and the appellant were also amongst those. After that ritual ceremony was over, the appellant and deceased were going to their place via Mithivedi. They had taken liquor and were under the influence of the same. One of the two had spent the money for the other one and about the realisation thereof a quarrel took place on the way. They altercated, as a result the appellant lost the temper. He was enraged and he caught the deceased by neck and pressed vigorously. Thereafter he pressed the nose and because of the resultant asphyxia and suffocation the deceased died. The appellant then lifted the dead body and threw it in the well nearby. Vastabhai Bhikhabhai Parmar went to the police station at Poshina and lodged the complaint narrating the case that he went to his field, and when he saw into the Well; he found a dead body floating. Receiving such information from Vastabhai Bhikhabhai the police at that stage found that it might be an accidental death or a suicide. But during the course of the investigation it could be divulged that it was the case of a murder because the accused had caused the same by throttling. Thereafter investigation on that line was held and at the conclusion of the investigation the chargesheet against the appellant for the offence under Section 302 & 201, IPC was filed before the Court of the ld. Judicial Magistrate (First Class) at Idar. The learned Magistrate was not competent in law to hear and decide the case of murder. He therefore committed the case to the Court of the learned Sessions Judge at Himatnagar. The case then came to be registered as Sessions Case No. 26 of 1987. The then learned Sessions Judge assigned the matter to the then learned Additional Sessions Judge at Himatnagar. A charge against the appellant was then framed which was read over and explained to the appellant. He then pleaded not guilty. The prosecution then led necessary evidence. At the conclusion of the hearing, the learned Judge below appreciating the evidence on record reached to the conclusion that the prosecution had successfully brought the guilt home to the appellant. He therefore held the appellant guilty and convicted and sentenced as aforesaid. It is against that judgment and order, the present appeal has been preferred.

3. It has been submitted on behalf of the appellant that here is the case wherein no conviction and sentence are ever possible looking to the evidence on record; but unfortunately the learned Judge below erroneously appreciated the evidence and

reached to the wrong conclusions; as a result the appellant came to be convicted; and therefore this Court may interfere and upset the finding. The learned Additional Public Prosecutor, Mr. K.P. Raval, representing the other side refuting all the submissions made on behalf of the appellant has submitted that in no case the judgment and order of the lower Court can be condemned as perverse, arbitrary or capricious. There is no necessity to set the evaluation right as the learned Judge below has committed no error either of law or of facts and so the appeal is required to be dismissed.

4. At the time of hearing, we made several queries. The learned Advocate representing the appellant fairly conceded that he had no reason to challenge the finding about the case of homicidal death. Dr. N.J. Patel (Exh.80) carried out the post mortem. His evidence in clear terms establishes that because of throttling and stuffing nostrills by gag Nana Dala Gamar died. He did not die of drowning. When it clearly appears that Nana Dala Gamar"s death is a homicidal death, which of the penal provisions will come into play is the point that now arises for consideration being hotly debated. According to the appellant, any other penal provision than Section 302, IPC would apply, while according to the learned APP, the penal provision already applied by the lower Court was required to be maintained as there was no material on record to alter the conviction by applying a particular provision instead of Section 302, IPC.

5. Which of the provisions will apply can best be determined finding out the intention of the accused. The intention can be gathered from the materials on record. It may be stated that the intention is the internal and invisible act of the mind of the offender and that has to be judged by visible and external acts appearing on record. For the purpose of ascertaining the intention, evidence of all the witnesses is not material. We will confine to the evidence of Reva Dita (Exh.10), Manra Bhema (Exh.19), Parbhu Harji (Exh.20), Nana Sona (Exh.21) and Himla Vela (Exh.23) throwing light on the proposition. Of course we were also urged to place reliance on the evidence of Bhura Dhira (Exh.22) by the learned APP, but it would not be just and proper to place reliance on that evidence because of the conduct of that witness. According to him, the appellant was about to do another wrong, and he seeing him, questioned what he was doing there near the Well. The appellant then threatened him with death and asked him to go away. This witness, after going to his home, did not inform any one. He even did not go to the police station to inform what he saw and the fact about threat given. He also did not go to the police patel or any respectable person in the village, and for no good cause kept the lips tight as if nothing had happened. After about 5 days when police went to the village and asked him to make the statement, he made the statement. When the witness at the earliest opportunity does not disclose the

fact he came to know about the incident to the authority in the village or to his nearer and dearer in the family, it would be a circumstance going to discredit the truth of his say. In view of his such unnatural conduct, we do not think it just and proper to place reliance on the evidence of Bhura Dhira and conclude what is logically possible. We will now refer the evidence of other aforesaid witnesses.

6. The cumulative effect of the evidence on record is that the deceased and appellant were addicted to liquor. During the night in question both had gone to Hira Bhura's place as ritual ceremony to drive the evil spirit out, if any, was to be performed. After midnight the appellant and deceased left the place of Hira Bhura. They were going to their village but on way they went to Parbhu Harji,(Exh.20) and asked him to sell liquor to them. He refused to sell as liquor was not in stock. Both then went to Nana Sona, (Exh.21) and demanded the liquor. Nana Sona sold them the liquor. Both took the liquor and they were then satiated. Then they left the shop of Nana Sona and started to go towards their village. When they reached to the village Mithivedi, Himla Vela (Exh.23) saw them passing and could mark that both were squabbling. It can therefore be said that they had taken too much liquor to control them. They had become thick-headed. The appellant it seems during the quarrel committed the wrong. At this stage, the evidence of Manra Bhema (Exh.19) should be borne in mind being the cynosure. What transpires from his evidence is that on 15th November 1986 he came to know about the death of Nana Dala. He also came to know that the dead body was brought out from the Well. He had then gone to the place where the Well was. It was decided by those assembled there not to cremate immediately, but to wait till the person committing the wrong was traced out. Some of the persons had gone to different places, and getting further information few of them went to the place of Vastabhai, the father of the appellant. The appellant was also present there. After he was trapped putting several questions, the appellant admitted that he had committed the wrong and it was his mistake. He then narrated the manner in which he committed the wrong. They had taken liquor and on way they had quarrelled because he demanded the money he spent for the deceased and the deceased was reluctant to make the payment. He therefore found that realisation of the amount he spent for the deceased would be a hard task. Because of the liquor he had taken he had become thick-headed and losing the temper he acted like a beast. He caught the neck and then pressed it forcefully. With the result, the deceased died of throttling and further because of stuffing of the gag in the nostrills. If we appreciate the evidence in this background, the intention that can be gathered is not that of murder but that of recovery of sum by force. It is pertinent to note that the appellant and deceased were fast friends and no one had any grievance against the other one. Both were maintaining

harmonious relations, and because of the good relations, they did not have any animosity or bitterness. However on the ill-fated night the appellant committed the wrong because he and deceased were highly drunk and had become thick-headed and when appellant demanded his dues and deceased for one or the another reason showed his inability to make the payment, the appellant lost the temper and committed the wrong. It can, therefore, be said that overpowered with patience and without any premeditation but certainly on grave and sudden provocation which was the result of inability of the deceased to make the payment, instantly, the wrong has been done and that too in a sudden fight or in the heat of anger. When that is so, the intention that can be gathered is not to kill the deceased but the way in which he violently pressed the throat of the deceased he must have the knowledge that by his act, the death is probable. When that is the case, not Section 302, IPC but Section 304 Part II, IPC will come into play. Simply because death is caused by asphyxiation, we cannot in all cases jump to the conclusion of murder. The above-stated facts do not point to the intention of murder. The contention of learned A.P.P. must therefore fail.

7. Having found that in this case, Section 302 will not apply, the appeal will have to be partly allowed and conviction and sentence inflicted by the lower Court are required to be altered to Section 304 Part II, IPC. It was submitted on behalf of the appellant that for the last 9 years and more, the appellant is in jail. Whatever he has undergone must, in our view, be treated to be the adequate sentence. After causing death of the deceased, Nana Dala, the appellant threw the dead body in the Well so as to destroy the evidence and save himself from the liability. The learned Judge below is, therefore, right in convicting the appellant under Section 201, IPC. As we have found that whatever sentence undergone is sufficient, we find no justification to award a separate sentence of the offence under Section 201, IPC. No other submissions were made.

8. For the foregoing reasons, the appeal is partly allowed. The judgment and order of the lower Court convicting the appellant of the offence under Section 302 IPC and sentencing him to rigorous imprisonment for life, is quashed and set aside; but altering the same, the appellant is convicted of the offence under Section 304 Part II and also under Section 201, IPC and sentenced to of the offence under Section 304 Part II, IPC to rigorous imprisonment already undergone. No separate sentence for the offence u/s. 201, IPC.

9. By now,the appellant has already undergone the sentence we are inflicting. Hence, he be set at liberty forthwith if no longer required in any other matter.

10. The muddamal be destroyed as per the order of the lower

Court.

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